Wylie C.J. (Borneo): The appeal is dismissed with costs and the deposit paid into court will be ordered to be paid out to the respondents' solicitors against taxed costs.

Appeal dismissed.

THOMAS v. BOOTY, EDWARDS & PARTNERS

[F.C. (Wylie C.J. (Borneo), Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) June 10, 1964]

[Kuching — Federal Court Civil Appeal No. 19 of 1964]

Practice and Procedure — Defence — Failure to file, within time prescribed — Delay of over a month — Application for extention of time, to file defence — Application by way of motion for judgment — Application for extention of time and motion heard together — No objection raised — Motion dismissed — Defendant granted time for filing defence — Whether proper — R.S.C. O. 27 rr. 4 and 11.

The appellant commenced proceedings against the respondents for pecuniary damages. The respondents did not file a defence within the time prescribed and over a month after the time had expired, they on January 8, made an application by way of summons in chambers for an order that they be at liberty to file a defence within two weeks of the order granting them such leave. On January 9, the appellant made an application by way of motion under O. 27 r. 11 for judgment. His affidavit in support disclosed that there had been negotiations between the parties which had broken down about December 10, i.e. a few days after the defence should have been filed. The motion for judgment was dismissed and the respondents were granted time for filing the defence. The appellant now sought to vary those orders. The respondents submitted as far as the motion for judgment was concerned that these proceedings did not come under O. 27 r. 11, but under O. 27 r. 4 because the claim was for pecuniary damages. The appellant argued that as the court below had ordered him to quantify the damages, these proceedings no longer came under that rule.

Held: (1) the mere specification in the writ of the amount which the appellant considered he was entitled to under each head in a claim for pecuniary damages was not sufficient to take the case out of O. 27 r. 4; it was still a claim for pecuniary damages and therefore the motion was properly dismissed by the court below;

(2) although the delay to file the defence could not be condoned, taking the other factors into consideration it could not be regarded as such a strong feature as to deprive the respondents of their opportunity to be heard.

FEDERAL COURT.

Appellant in person.

Nayar for the respondents.

Wylie C.J. (Borneo) (delivering oral judgment): This appeal is concerned entirely with a question of procedure. The defendants did not file a defence within the time prescribed and on the 8th day of January over a month after the time had expired the defendants took out a summons-in-chambers applying for an order that they be at liberty to file a defence within two weeks of the order. That was supported by an affidavit. The reasons given were in effect that the advocate on the record was obliged to consult, and apparently got instructions from, a firm of advocates in Singapore.

On the 9th January the plaintiff moved for judgment and it is accepted that the application for motion was made under Order 27 rule 11. That was supported by an affidavit by the plaintiff which disclosed that there had been negotiations between the parties but that those negotiations broke down about the 10th of December a few days after the defence should have been filed.

The motion for judgment was dismissed and the defendants were granted time for filing the defence. The appeal has been brought to vary these orders. They are separate orders.

The first point raised concerns the hearing of the motion and summons together in chambers. It was conceded on behalf of the appellant that no objection was made to that procedure. Counsel said he was under a misapprehension at first, but during the hearing, he became aware both applications, both the motion and the summons, were being dealt with and he raised no objection. These are two applications in the same civil suit. If parties in these circumstances allow the proceedings to go on without any objection, then it is too late to raise that point of procedure in this court. I do not say at this stage, I am not expressing any opinion, whether it was in fact wrong to hear both applications together.

This disposes of the point raised in the first and second grounds of appeal.

So far as the motion for judgment is concerned it has been submitted on behalf of the respondents that these proceedings do not come under Order 27 rule 11 and that the correct rule is Order 27 rule 4 because the plaintiff's claim was for pecuniary damages.

The appellant submits that, as the court below had ordered him to quantify the damages, these proceedings no longer came under that rule. I cannot accept that submission. The claim in the writ is for pecuniary damages. All that has happened is that the plaintiff has specified the amount that he considers he is entitled to under each head. That is not sufficient to take the case out of rule 4. It is still a claim for pecuniary damages. In my judgment this motion was properly dismissed.

In regard to the summons for extension of time in which to file the defence, I have already said that there had been negotiations between the parties. This is not a case where the defendant had merely done nothing. I must say the defendant has been, in my opinion, ill-advised to have delayed for about a month. Again in my experience it is in circumstances like these that advocates usually exchange letters arguing that

the defence may be filed later. It is common practice for the legal representatives of parties to agree to an extension of time. That course should have been followed in this case, but it does appear that the defendants did nothing about this case for something like a month. That sort of delay cannot be condoned, but that is only one factor to be taken into account. The other factors as I see it in these proceedings are these: There were negotiations, and extension of time for filing a defence should have been treated as a matter of course, as I have suggested several times during the hearing of this appeal. Moreover it is a waste of time to shut out a defence, because immediately judgment was given in default the defendant would apply to set it aside. An order would be granted if there is a defence and the defendant had not, in effect, been refused an opportunity for the court to hear his side of the case. We are concerned only with the application of rules of procedure. These applications should not amount to a denial of the principles of justice. It is for these reasons that extensions of time are usually granted as a matter of course unless there are very strong circumstances to show that these are delaying tactics of some major feature of that nature. Although I do not approve of the delay of a month I cannot regard it as such a strong feature as to deprive the applicant of his opportunity to be heard.

For these reasons I would dismiss this appeal. I think the judge in the court below made a proper order, or rather orders.

Wee Chong Jin C.J. (Singapore): I would also agree that the orders made by the Judge in the court below were properly made and made in proper exercise of his discretion.

Tan Ah Tah F.J.: I agree that the appeal should be dismissed.

Wylie C.J. (Borneo): Appeal will be dismissed with costs.

Usual order with regard to the deposit to the respondents against costs.

Appeal dismissed.

RE BHAGWAN SINGH DECD.

[O.C.J. (Gill J.) July 7, 1964]

[K.L. — Originating Summons No. 104 of 1961]

Conflict of Laws — Domicile — Meaning of — Domicile of choice — Declarations of intention as to change of — Principles to be applied when considering — Domicile distinguished from nationality.

Distribution of estate — Ascertainment of domicile of deceased — Whether distribution according to Hindu or Malayan law.

The deceased was born in Kuala Lumpur on May 15, 1915 and was the son of one Prem Singh who was a British Subject born in India. Prem Singh traded in Kuala Lumpur but died in India. The deceased had his business in Malaya and Singapore and had a fixed place of abode in Kuala Lumpur which was owned by the deceased and the applicant jointly. The deceased spent most of his lifetime in Malaya except for making short visits to India once in about 6 or 7 years.

The applicant commenced these proceedings by way of originating summons as the administrator of the estate of the deceased for the determination of the question whether the deceased at the time of his death was domiciled in Malaya or India. Affidavits were filed by the applicant and the second respondent (a son of the deceased) in which they exhibited copies of letters and telegrams sent by the deceased after the last war which according to them showed that it was the deceased's intention to retire and settle down in India.

Held: (1) all the circumstances of the deceased's life indicated that he intended permanently to live in Malaya and that he acquired a domicile of choice in Malaya before the last war;

(2) although the affidavits filed in the proceedings contained some evidence of the deceased's declarations of intention on the question of a further change of his domicile, these did not amount to an abandonment of the domicile of choice.

Cases referred to:—

(1) *Whicker* v. *Hume* (1858) 7 H.L.C. 126, 160.

(2) *Craignish* v. *Hewitt* [1892] 3 Ch. 180, 192.

(3) *Moorhouse* v. *Lord* (1863) 10 H.L.C. 272.

(4) *Winans* v. *A.G.* [1904] A.C. 287.

(5) *Ramsay* v. *Liverpool Royal Infirmary* [1930] A.C. 588.

(6) *Moore* v. *Darell and Budd* (1832) 4 Hog. Ecc. 346, 162 E.R. 1472.

(7) *Ross* v. *Ross* [1930] A.C. 1.

(8) *Boldrini* v. *Boldrini and Martini* [1932] Prob. 9, 15.

ORIGINATING SUMMONS.

Morris Edgar for the applicant.

N. A. Marjoribanks for the 1st and 3rd respondents.

L. P. Thean for the 4th and 5th respondents.

Respondent No. 2 absent.

Cur. Adv. Vult.

Gill J.: These proceedings by way of originating summons have been brought by the applicant as the administrator of the estate of Bhagwan Singh s/o Prem Singh deceased for the determination by the court of the question as to whether the said deceased at the time of his death was domiciled in Malaya or in India, the country of his origin. Arising out of the answer to this question is the further question whether, in the event of a finding by the court that the deceased was domiciled in India, his estate may be distributed in accordance with the formula set out in the affidavit of Harnam Singh which is exhibited to the affidavit of the applicant filed in support of these proceedings.

The deceased was born on the 15th of May, 1915 in Kuala Lumpur and was the son of one Prem Singh, who was a British subject born in